participants.[163]

51. Under these worst-case assumptions, therefore, the proposed merger is a merger to monopoly. The post-merger Herfindahl Hirschman Index ("HHI") [164] is 10,000, and the change in the HHI is 4,992.[165] These estimates exceed the threshold specified in the *DOJ/FTC Guidelines* above which mergers are "presumed . . . to create or enhance market power or facilitate its exercise."[166] It is widely accepted that, absent offsetting economies, a monopolist will charge a higher price than firms in a competitive market, including a duopoly.[167] Thus, we would expect that, other things being equal, the merged firm would charge prices that are higher than those charged by Applicants pre-merger.

52. Unfortunately, we lack sufficient data to estimate the size of the likely price increase, if any. While it is true that economists, in recent years, have developed econometric techniques to simulate likely unilateral effects arising from horizontal mergers,[168] these merger simulation models require data or assumptions about demand, marginal cost, and firm behavior to estimate the likely unilateral effects of horizontal mergers. Because we lack sufficient data concerning demand elasticities, among other things, we cannot employ such a merger simulation to quantify the likely price increase. Nevertheless, given that we are assuming a merger to monopoly, it is reasonable to predict that, absent exceptional countervailing efficiencies,[169] prices are likely to be higher after the merger than before.

53. Applicants argue that, due to the dynamic nature of demand for satellite radio services, the merged entity would actually have an incentive to lower, not raise, prices.[170] In particular, CRA asserts that SDARS is subject to "dynamic demand effects."[171] According to CRA, firms like XM and Sirius must take into account the impact of price changes on not only their current subscribers, but also on prospective new subscribers. Such dynamic considerations lead to "penetration pricing," which involves

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[163] An "uncommitted entrant" is a firm that is likely to enter the market "within one year and without the expenditure of significant sunk costs of entry and exit, in response to a 'small but significant and nontransitory' price increase." *See DOJ/FTC Horizontal Merger Guidelines* at § 1.32.

[164] The HHI is calculated as the sum of the squares of the market shares of each firm participating in a relevant market. The HHI can range from nearly zero in the case of an atomistic market to 10,000 in the case of a pure monopoly. Because the HHI is based on the squares of the market shares of the participants, it gives proportionately greater weight to carriers with larger market shares. Changes in market concentration are measured by the change in the HHI. *See id.* § 1.5.

[165] The predicted change in HHI is based on 2007 year end SDARS market shares of 52 percent for XM and 48 percent for Sirius. XM, *XM Satellite Radio Holdings Inc. Announces Fourth Quarter and Full Year 2007 Results* (press release), Feb. 28, 2008; Sirius, *Sirius Reports Fourth Quarter and Full Year 2007 Results* (press release), Feb. 26, 2008.

[166] Section 1.51 of the *DOJ/FTC Horizontal Merger Guidelines* specifies that mergers that produce a post-merger HHI above 1800 and an increase in the HHI of greater than 100 points will be presumed to have an anticompetitive effect.

[167] DENNIS W. CARLTON AND JEFFREY M. PERLOFF, MOD. INDUS. ORG. 56-120, 153-235 (3d. ed. 2000) ("Carlton & Perloff").

[168] *See, e.g.,* Gregory J. Werden, *Simulating the Effects of Differentiated Products Mergers: A Practical Alternative to Structural Merger Policy,* 5 GEO. MASON L. REV. 363 (1997); Roy J. Epstein & Daniel L. Rubinfeld, *Merger Simulation: A Simplified Approach with New Applications,* 69 ANTITRUST. L. J. 883 (2002).

[169] *See* Section V, *infra.*

[170] Joint Opposition at 31-32.

[171] Joint Opposition, CRA Study at 61-63, App. A.

setting prices below the price that would maximize short-run profits in order to maximize subscriber growth and long-run profits. Applicants further argue that there are "dynamic demand spillovers," i.e., that the incentive of one SDARS provider to lower prices is diminished in the current market because some of the benefits of early adopters (e.g., word-of-mouth, product demonstrations, etc.) accrue to its competitor. The merger, according to CRA, could actually lower prices by internalizing these spillover effects and strengthening the incentive to price low, in order to "grow the market."

54. While we acknowledge the theoretical possibility of such a dynamic demand spillover externality, we note that Applicants have not attempted to quantify the effect of internalizing this externality. They have also failed to show convincingly the location of SDARS on the product adoption curve or the likely ultimate penetration rate for SDARS. Finally, they have not demonstrated that this internalization effect will outweigh the incentive of the merged firm to raise price once their main competitor is eliminated.

55. Furthermore, assuming, *arguendo,* that there are important dynamic demand spillovers and that immediately upon consummation of the merger the merged entity would have an overall incentive to lower price, the concern remains that the merged firm will have the incentive and ability to raise price at a later point in the product life cycle. In particular, when selling a product with dynamic demand effects, firms have an incentive early in the product's life-cycle to expand sales and enhance long-run profitability by pricing below the short-run profit maximizing price; but the incentive to engage in penetration pricing diminishes as the product matures, and prices can be expected eventually to rise to the short-run profit maximizing level.[172] Under our assumption of a separate SDARS product market and significant entry barriers, the merged firm would appear to have the incentive and ability to raise prices to the monopoly level later in the product cycle.[173]

56. Under the assumption that SDARS is the relevant product market, we therefore conclude that the merged firm may have an increased incentive and ability to raise the price of SDARS over a non-transitory period of time. As described in further detail in Section VI below, however, we find that the voluntary commitments and other conditions will adequately address this competitive concern. In particular, the price cap condition ameliorates possible harm to consumers, and the new programming packages offer consumers more pricing choices.[174] We therefore conclude, even assuming the worst-case scenario, that grant of the application is in the public interest.

57. Some commenters argue that the current transaction is similar to the proposed transaction in *EchoStar-DIRECTV*, and thus we must, as we did there, designate the application for hearing.[175] As we have stated, if we are unable to find that a proposed transaction serves the public interest or if the record presents a substantial and material question of fact, we must designate the application for hearing.[176] In *EchoStar-DIRECTV*, there was significant evidence in the record to demonstrate that the applicants

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[172] *Id.*

[173] CRA asserts that when SDARS is mature, the market will be subject to intense competition from audio content over mobile broadband access technologies, more robust and widespread cellular networks, and other technological advances that will prevent the merged firm from exercising market power. *Id.* at 27-30, 63. In response, Sidak contends that claims about future constraints on the market power of XM and Sirius are speculative and call for an unusually long time horizon for assessing market power. C3SR Response, Exh. A, Second Supp. Decl. of J. Gregory Sidak at 19-22 (July 24, 2007) ("C3SR, Sidak Second Supp. Decl.").

[174] *See* Sections VI.B.1 and VI.B.2., *infra.*

[175] *See, e.g.,* C3SR Petition at 25-28; NAB Petition at 3, 6; NABOB Petition at 5-6; Clear Channel Comments at 4-6; Entravision Comments at 6-8.

[176] *See* 47 U.S.C. § 309(e).

competed against one another and that, without such competition, prices were likely to increase, especially in markets that did not have access to cable. The Commission was unable to conclude, therefore, that the *EchoStar-DIRECTV* transaction served the public interest, and the transaction was designated for hearing.

58. Although there may be surface similarities between the two transactions, there are significant differences. As we have explained above,[177] because there has been little or no price variation it is not possible to use the normal tools of econometrics to define the relevant market or determine likely impacts on price, and conducting a hearing would not change this basic fact. In addition, as discussed below, Applicants have offered voluntary commitments to ensure that the transaction serves the public interest. For example, Applicants voluntarily commit to not raising their rates for three years after the consummation of their merger.[178] They voluntarily commit to allowing any manufacturer to develop SDARS receivers and to permit manufacturers to incorporate in satellite radio receivers any other technologies that would not result in harmful interference, including HD Radio technology, iPod ports, or Internet connectivity.[179] Applicants also voluntarily commit to setting aside some of their channels for noncommercial educational and informational programming and for lease to certain "qualified entities."[180] And, they voluntarily commit to offer a la carte and other programming packages, thereby increasing consumer choice and allowing parents, for example, to better control the types of programs to which their children are exposed. Applicants in *EchoStar/DIRECTV* made no such commitments to mitigate potential harms or to create benefits that would outweigh the potential harms. Thus, unlike in *EchoStar/DIRECTV,* in this transaction there is no need for a hearing. On the basis of the record before us, we are able to conclude that Applicants' significant voluntary commitments and the other conditions we are imposing to our approval of the transaction are sufficient to ameliorate any public interest harms that otherwise might have resulted from the transaction and that the transaction will, as a result, create consumer benefits and advance other aspects of the public interest. Moreover, to ensure that no longer-term harms will result from the transaction, six months prior to the expiration of the commitment period, the Commission will seek public comment on whether the price cap continues to be necessary in the public interest. The Commission will then determine whether it should be modified, removed, or extended.

2. Potential Vertical Effects

59. Some commenters express concern about the vertical effects the merger may have in the market for SDARS and SDARS-related equipment. Two commenters raise the possibility of monopsony power in the content market, and seek conditions to mitigate such harms. In addition, U.S. Electronics, Inc. ("USE") alleges that because there will be only one SDARS provider, the merged company will effectively have a monopoly in the market for SDARS receivers. Garmin expresses concern that its equipment for weather information in the aviation market will become obsolete if the merged company chooses to use the Sirius system rather than the XM/Garmin system. We address these issues in turn.

60. *Monopsony Power.* Two commenters, McGannon and King, raise the concern that the transaction creates the potential for monopsony power. Both argue that the upstream market for national satellite radio content is a separate market, and thus the merger will produce a single purchaser for content

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[177] *See* Section IV.B.1.a., *supra.*

[178] Applicants' June 13, 2008 Ex Parte at 4.

[179] *Id.* at 3-4.

[180] *Id.* at 3. According to Applicants, a qualified entity "includes any entity that is majority-owned by persons who are African American, not of Hispanic origin; Asian or Pacific Islanders; American Indians or Alaskan Natives; or Hispanics." *Id.* at n.2.

in this market.[181] With respect to monopsony power in the market for programming, the economic literature does not identify a single point at which monopsony power becomes likely.[182] A necessary condition is that an entity or entities must possess sufficient size in the relevant market to dictate pricing. In general, large purchasing power delivers both benefits and potential costs to consumers. The benefits come from the fact that a large purchaser that receives programming discounts will pass on some of these reduced costs to subscribers (for example, in the form of lower prices). The potential harm to consumers comes from the fact that these discounts may discourage or preclude competitive entry,[183] and thereby result in higher prices or reduced service quality, or that the monopsony purchaser may negotiate such terms from content providers that the quality of programming is lowered.[184]

61. Neither commenter presents quantitative evidence that the upstream market for content in which Applicants purchase content is a separate market. Indeed, King refers to the fact that Sirius was able to "steal" Howard Stern away from terrestrial radio.[185] It would seem straightforward that, at least in that case, terrestrial radio and SDARS were bidding against each other for content. Additionally, neither commenter identifies specific harms that will result. Indeed, the merged firm's ability to negotiate better terms for expensive talent could benefit consumers via lower rates, and it would not be in the combined company's interests to negotiate deals that harm the quality of content, especially while seeking to increase subscriber penetration and so move to profitability. We thus find that the merger is not likely to harm the public interest as a result of the exercise of monopsony power over content providers. As a result, we decline to take action with regard to potential monopsony power.

62. *SDARS Receivers.* USE claims that the transaction would create a vertical monopoly in the manufacturing and distribution of satellite radio receivers and that this would harm consumers.[186] USE argues, for example, that even if the combined company does not raise its monthly subscription fee, it could raise equipment prices to optimize overall revenues. This is a potential harm, USE states, that

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[181] McGannon June 29, 2007 Ex Parte at 3-4; Bert W. King ("King") Comments at ¶ 57; *see also* Letter from Lawrence A. Walke, NAB, to Marlene H. Dortch, Secretary, FCC (June 19, 2008) at 1 & Atts. (stating that content providers will lose negotiating leverage if the merger is approved).

[182] For a general discussion of monopsony power, see Carlton & Perloff, *supra* n.167, at 105-07.

[183] However, our current assumption that this is a merger to monopoly does not preclude future competition to SDARS by a new or nascent technology.

[184] The question of who benefits more from a bargain is merely a transfer between the two bargaining parties, not a detriment to efficiency that results in a societal cost. Efficiency concerns arise only once an entity with market power can restrict supply and thus change the market price from the most efficient level.

[185] King Comments at ¶ 57; *see also* Sirius Nov. 16, 2007 Response to Information and Document Request at SIRIUS-FCC-I.B.001647-001657 **[REDACTED]**.

In this Order, "REDACTED" indicates that confidential or proprietary information that is subject to a Protective Order in this proceeding has been redacted from the public version of this Order. The unredacted text is included in the confidential version of this Order, which is available upon request only to those parties who have executed and filed with the Commission signed acknowledgments of the protective orders. Qualified persons who have not yet signed the required acknowledgments may do so in order to obtain the confidential version of this Order.

[186] Letter from Charles H. Helein, Counsel for USE, to Robert M. McDowell, Commissioner, FCC (Jan. 15, 2008) at 1 ("USE Jan. 15, 2008 Ex Parte"); *see also* Letter from Robert E. Cooper, Jr., Att'y Gen. of Tennessee, on behalf of Att'y Gens. of Connecticut, Iowa, Kansas, Louisiana, Maryland, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, Rhode Island, Washington, and Wisconsin, to Marlene H. Dortch, Secretary, FCC (July 3, 2008) at 3 ("Tenn. Att'y Gen. July 3, 2008 Ex Parte").

will be difficult to detect because "prices at retail points of sale are diverse and hard to supervise."[187] To prevent this harm, USE asks that we require the combined company to open and make available the technical specifications of its devices and network so that receiver manufacturers can develop receivers for consumers to use as they choose.[188] USE states that its proposed condition is consistent with well-established open access polices and precedent of the Commission, including the *Carterfone*[189] decision and the Commission's recent "reaffirm[ation] [of] the historical rationale for open access policies in its service rules for the Upper 700 MHz spectrum block."[190] MAP supports USE's request, asserting that the post-transaction "vertical monopoly would, by design and in effect, eradicate consumer choice and price competition across manufacturers."[191]

63. Applicants initially opposed USE's request, arguing that USE is attempting to resolve a private contractual matter currently subject to arbitration in the guise of seeking a merger condition,[192] and that the proposed condition would inure to USE's benefit alone without regard to concerns about the quality of equipment made by Applicants' suppliers.[193] Applicants also contend that the combined company would not have an economic incentive to slow innovation, increase receiver prices, or cause any other potential harm of which USE complains.[194] Rather, Applicants maintain, the combined company would have the incentive to ensure the availability of low-cost, innovative, high-quality receivers.[195] Moreover, Applicants state that USE's argument is based on an erroneous factual predicate because neither XM nor Sirius relies on a single source for radios.[196]

64. USE replies that its current arbitration relates to past issues with Sirius and is unrelated to the potential anticompetitive effects posed by a vertical monopoly in the satellite radio market.[197] Further,

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[187] USE Jan. 15, 2008 Ex Parte at 3. USE also claims that the merged entity's additional hard-to-detect harms to consumers could include reduced equipment quality, lower quality of customer service, and slower innovation cycles. *Id.*

[188] *See* USE Reply at 8 (quoting approvingly Public Knowledge's description of the open-device condition).

[189] *See Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420 (1968).

[190] USE Jan. 15, 2008 Ex Parte at 2 (stating that the Commission determined that the winners of the six C Block licenses would not be permitted to restrict subscribers to using only those devices that the licensees provide).

[191] Letter from Parul P. Desai, Andrew Jay Schwartzman, MAP, and Michael Calabrese, New America Foundation, to Marlene H. Dortch, Secretary, FCC (Jan. 29, 2008) at 1. In addition to *Carterfone*, MAP mentions the Commission's 2005 cable set-top box leasing order as an example of Commission decisions following open access principles. *Id.* at 2.

[192] Consolidated Opposition of Sirius and XM to USE and NAB (Dec. 26, 2007) at 2 ("Consolidated Opposition"). Applicants state that USE is a former Sirius licensed manufacturer whose contract expired. *Id.* at 3. Applicants explain that Sirius opted not to continue the relationship because the parties had "incompatible business philosophies" and, at the time of the contract's expiration, "were in arbitration covering almost every aspect of the parties' relationship." *Id.*

[193] Consolidated Opposition at 4 ("This market intrusion would undoubtedly benefit USE – and essentially derail USE's arbitration with Sirius – but it is difficult to see how it would benefit consumers or, in fact, make it easier for the Commission to conclude the WCS/Satellite Radio Terrestrial Repeater rulemaking").

[194] *Id.*

[195] *Id.*

[196] *Id.* at 5 (citing radio suppliers as including Delphi, Pioneer, Samsung, Alpine, Audiovox, Sony, Polk, Rotel, Kenwood, Clarion, and Visteon).

[197] USE Reply at 1-2.

USE maintains that Applicants are the only parties responsible for the design and development of hardware compatible with their networks, and therefore would be able to control the manufacture of receivers.[198] Finally, USE argues that the power of the combined firm would hurt not only it but also small retailers because small retailers would not have sufficient negotiating power to receive favorable terms for such things as promotions and return policies.[199]

65. Currently, Applicants each are intimately involved with the design, manufacture, and sale of SDARS receivers. As is the case in other telecommunications industries (e.g., wireless telecommunications, satellite television), SDARS receivers are sold branded or co-branded with the XM or Sirius name and can receive only one of the two SDARS services. In addition, Applicants own the intellectual property that is necessary for the receivers' manufacture. Consistent with the practices of providers in other sectors of the telecommunications marketplace, the two Applicants subsidize the retail price of SDARS receivers paid by the consumer. Partially because of that subsidy, the only current manufacturers of SDARS receivers are in direct contractual agreements with Applicants, and we see no basis in the record for concluding that additional manufacturers would enter the market. The record also indicates that Applicants are **[REDACTED]**.[200]

66. We find that the proposed merger is likely to harm the public interest by allowing one company to gain increased leverage over the terms and conditions of the contracts for the manufacture of SDARS radios. We agree with USE's concern that the loss of head-to-head competition between Applicants has the potential of harming consumers by dampening innovation in the manufacture of SDARS receivers. In addition, we note that there could be other risks. For instance, because of their involvement in the manufacture of SDARS receivers, Applicants could also prevent the development of SDARS receivers that are compatible with other forms of audio entertainment, such as MP3 players and HD Radio. However, Applicants have addressed this concern by voluntarily committing to an open, non-exclusive architecture. Accordingly, we accept Applicants' voluntary commitment to permit any device manufacturer to develop SDARS receivers and to incorporate other technology, such as HD Radio, iPod ports, and Internet connectivity so long as it will not result in harmful interference with the merged company's network. We conclude that this, and the additional voluntary commitments on open access, adequately mitigate the potential harm presented by this transaction, as discussed in Section VI.B.4, below.

67. *Aeronautical Services.* Garmin International, Inc. ("Garmin") raises the concern that the equipment it developed for use with XM's real-time weather information services will become obsolete after the merger because Applicants' satellite-based weather systems are not compatible, and Garmin is

[198] *Id.* at 3. USE states that Directed Electronics, Inc. ("DEI") recently reported to analysts that it held 95 percent of Sirius's aftermarket sales in the third quarter and 62 percent of market share for retail satellite radio receivers. *Id.* at 2-3. With regard to the radio manufacturers listed by Applicants, USE states that Applicants have pointed to historical manufacturers and their historical account does not describe the market today. *Id.* at 3.

[199] *Id.* at 4. Applicants also argue that USE lacks standing because it did not file a petition to deny the merger application in a timely manner. Consolidated Opposition at 1. To the extent USE failed to timely file a petition to deny, we will treat USE's comments as an informal objection and address them here. *See* 47 C.F.R. § 1.41; *Pacific Gas and Electric Company*, Memorandum Opinion and Order, 18 FCC Rcd 22761, 22765-66 n.47 (2003); *see also Nextel License Holdings 4, Inc.*, Order, 17 FCC Rcd 7028, 7033 ¶ 16 (2002) (noting that there is no standing requirement to file an informal objection).

[200] *See, e.g.,* Sirius Mar. 4, 2008 Response to Information Request at SIRIUS-FCC-SUPP.000217-00018, SIRIUS-FCC-SUPP.000513-000559; SIRIUS-FCC-SUPP.000631-000700; XM Mar. 3, 2008 Response to Information Request at XM-S-0000001-0000053, XM-S-00000054-0000138, XM-S-0000139-0000208; XM Mar. 18, 2008 Response to Information Request at XM-S-001875-001928.

concerned that the merged company will choose Sirius's system and abandon that of XM.[201] Garmin states that abandoning the XM/Garmin system is contrary to the public interest because the Sirius system is not fully developed, and because commercial aviators will each face $5,000 to $6,000 in costs to switch.[202] Garmin therefore urges the Commission to condition approval of the merger on the continued use by XM of Garmin's devices for a period of 20 years, which it says are their normal life expectancy.[203]

68. We reject Garmin's proposed condition. First, Garmin's claims are speculative; it is not clear whether the merged company will choose to use only one weather information service or, if so, which one that will be.[204] Moreover, we find it unlikely in the near term that the merged company would strand its current customers. Indeed, their submissions indicate exactly the opposite.[205] Finally, as for the longer term, the question of which weather information service the merged company should choose (or whether it should provide both services) is one best answered by the company and the marketplace.[206]

C. Other Potential Public Interest Harms

69. In this section we examine the impact of the merger on the Commission's goals of diversity and localism. We find that Applicants' voluntary commitments address concerns about the potential loss of diversity. We find that the merger is not likely to frustrate the Commission's localism goal.

1. Impact of the Transaction on Diversity

70. Some commenters contend that the merger would result in reduced programming diversity because the reduction in competition would diminish the incentive to innovate and provide diverse programming[207] and because channel capacity available for other channels will be reduced when the combined entity allocates some of its capacity to "best of both" channels.[208] Additionally, some commenters allege that the merger will harm independent content producers, DJs, artists, and on-air personalities that now enjoy the potential of having two companies compete for their services; the merger, by eliminating this competition, therefore would lead to fewer choices and less program diversity for

[201] *See generally* Letters from M. Anne Swanson, Dow Lohnes, Counsel for Garmin, to Marlene H. Dortch, Secretary, FCC (Apr. 26, 2007 and Apr. 27, 2007).

[202] *Id.*

[203] *Id.*

[204] *See, e.g., News Corp.-Hughes Order*, 19 FCC Rcd at 583, 585 ¶¶ 245, 248 (finding that speculative harms "do not provide a basis for either denying their Application or for imposing regulatory conditions"); *Comcast-AT&T Order*, 17 FCC Rcd at 23308 ¶ 160.

[205] *See* Joint Opposition at 22-23 ("the combined company will have every incentive to maintain and improve upon these offerings without any need for Commission action.").

[206] In addition, we decline to intercede here in distribution negotiations between Applicants and RCN Corp., who urges the Commission to require Applicants to make assurances that SDARS programming will continue to be made available to RCN. *See* Letter from Richard Ramlall, Senior Vice Pres., Strategic & External Affairs and Programming, RCN Corp., to Kevin J. Martin, Chairman, FCC (July 17, 2008) at 2-3.

[207] NAB Petition at 30-32; AAI Comments at 8, 12-15; Entravision Comments at 17-18; Prometheus Comments at 4-5; RIAA Comments at 7; John Smith Comments at 2, 4; Clear Channel Comments at 7; Letter from Michael L. Barrera, President and CEO, United States Hispanic Chamber of Commerce to Thomas Barnett, Asst. Att'y Gen, Antitrust Div., DOJ and Kevin J. Martin, Chairman, FCC (Aug. 28, 2007) at 2-3 ("USHCC Aug. 28, 2008 Ex Parte").

[208] AAI Comments at 12-13; Independent Spanish Broadcasters Assoc. ("ISBA") Comments at 1-2.

consumers.[209] Commenters also argue that the elimination of one of the SDARS providers would cause a reduction in viewpoint diversity.[210] Other commenters allege that the transaction would reduce diversity in minority- and women-oriented and owned programming[211] and adversely affect the hiring of minorities and women for management positions.[212]

71. Applicants and other commenters argue that the merger would likely lead to no significant reduction in programming diversity, and may enhance the incentives of Applicants to provide more diverse programming.[213] Applicants state that the merger will allow them to eliminate overlapping and redundant programming, giving them more channel capacity to use for more diverse offerings serving smaller audiences, including minority and children's programming.[214] Applicants note that they currently offer 12 identical program channels and 75 substantially similar channels,[215] and aver that eliminating their redundant programming would free capacity for more diverse offerings not currently offered on either system.[216] Further, Applicants argue that a combined company would be better positioned financially to take a chance on niche programming.[217] In this regard, Public Knowledge observes that low revenues and a small audience base have forced Applicants to abandon alternative and niche programming in favor of mainstream programming that attracts the largest audiences. It argues that the higher revenues and elimination of duplicate programming will provide the merged entity with the means to carry alternative programming and programming for underserved communities.[218]

72. To address this potential harm, as discussed in more detail in Sections VI.B.5 and VI.B.6., below, Applicants voluntarily commit to lease capacity to qualified entities and to set aside capacity for noncommercial educational and informational programming.[219] We believe this voluntary commitment mitigates the potential harm from a decrease in diversity.

2. Impact of the Transaction on Broadcasters' Advertising Revenues

73. Commenters claim that the merger would cause terrestrial broadcasters to lose advertising revenue to the merged SDARS provider, which would ultimately result in the reduction of their production and airing of local programming and thereby disserve listeners and the Commission's

209 NAB Petition at 31-32; Prometheus Comments at 4-5; RIAA Comments at 7. This argument also is addressed in part in Section IV.B.2, *supra*.

210 AAI Comments at 14-15; Entravision Comments at 18; NABOB Petition at 11, 12-13; NPR Petition at 3-7; TAP Petition at 3-4.

211 AWRT Petition at 5-6; NABOB Petition at 9-12; TAP Petition at 4; ISBA Comments at 1-2; USHCC Aug. 28, 2007 Ex Parte at 2-3.

212 AWRT Petition at 5-6.

213 Application at 12-13; Public Knowledge Comments at 4; CEI Comments at 3-4.

214 Application at 12-13; Joint Opposition at 19-21.

215 Application at 12-14.

216 *Id.* (stating that the freed-up capacity could be used for expanded non-English language programming, children's programming, minority-oriented programming, and programming related to public safety and homeland security).

217 Joint Opposition at 19-21; *see also* Women Impacting Public Policy ("WIPP") Comments at 1 (asserting that a merger would offer more opportunities for women and minority programmers).

218 Public Knowledge Comments at 4.

219 *See* Sections VI.B.5, VI.B.6, *infra*.

localism policy goals.[220] NAB claims that the merged entity "would be expected to use revenues from its higher-priced premium service offerings to cross-subsidize its national advertising rates with revenues from its premium service offerings, which would allow the merged entity to drive down advertising rates, to the detriment – in the first instance – of broadcasters."[221] 46 Broadcasters similarly argue that the merged entity will use "monopoly rents" to cross-subsidize its "aggressive entry into the advertising markets" to the competitive detriment of local broadcasters.[222] NAB also claims that broadcasters will lose advertising revenue and thereby be forced to reduce the amount of locally produced programming as a result of the merger because the combined entity will increase the amount of commercials in its programming.[223] NAB asserts that as a result of a significant increase in commercial time post-merger, "[t]he amount radio stations can charge advertisers to reach SDARS subscribers in their audiences will fall as the satellite services sell more commercial time to advertisers, and radio stations' revenues will decline as a consequence."[224] Applicants have not responded to this issue.

74. The Commission finds that the commenters have failed to provide sufficient evidence that the proposed merger would substantially impact the revenues from the sale of advertising by broadcasters, to the detriment of their ability to air locally oriented programming. We find that these claims of harm are speculative. The commenters do not offer sufficient economic analysis to show that it would be economically beneficial to the merged entity. Commenters' only evidence that the merged entity plans to increase commercial time during programming, post-merger, is the mention of increased "advertising synergies" post-merger during a conference call with investors and in financial analyst reports.[225] Such evidence fails to show with any certainty that the merged entity intends to increase the use of commercials in its programming. Indeed, as NAB notes, programmers always run the risk of losing audience when they increase the amount of commercials during programming.[226] The loss of revenue from the loss of subscribers needs to be weighed against the incremental increase in revenue obtained from the additional commercial time, to determine whether it would be economically feasible.[227]

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[220] NAB Petition at 33.

[221] *Id.* at 33.

[222] 46 Broadcasters Petition at 5.

[223] NAB Response to Comments, Wildman Decl. at ¶ 12.

[224] *Id.* at ¶ 28. Wildman explains that currently, due to a lack of significant amount of commercials on satellite radio, "local radio stations remain the primary audio services through which advertisers can reach SDARS subscribers." For this reason, Wildman suggests, increased SDARS subscriber counts have not had as large an impact on terrestrial radio's revenues as one might otherwise predict." *Id.*

[225] *Id.* at ¶ 26. C3SR cites to a comment of Mel Karmazin made during an interview on Forbes.com: "[Sirius] would like to see advertising revenue eventually make up about 10% of Sirius' total revenue, up from the current 4% to 5%." C3SR Oct. 3, 2007 Ex Parte, Att. Mr. Karmazin's statement provides insufficient evidence to conclude that the merged entity has immediate plans to increase commercial time during programming to the detriment of broadcasters.

[226] *See* NAB Response to Comments, Wildman Decl. at ¶¶ 18, 23-24.

[227] C3SR submits a presentation, which includes the calculation "Profitability of an Increase in Commercial Time" to show whether it would be advantageous for the merged entity to increase commercial time. Letter from Benjamin D. Arden, Williams Mullen, Counsel for C3SR, to Marlene H. Dortch, Secretary, FCC (Oct. 3, 2007), Att., "Analysis of the CRA Submission" ("C3SR Oct. 3, 2007 Ex Parte"). However, we note that C3SR's computation only restates the above-referenced economic assumption: if the increased revenue from additional commercials is greater than the revenue declines due to subscription losses, then the merged entity would consider adding additional commercial time. There are no additional variables included in the calculation to make any conclusions as to (continued....)

Moreover, we note that Applicants cite to two studies from 2006 and 2007, which find satellite radio accounts for only about 4 percent of all radio listeners.[228] Thus, there is insufficient evidence that the merger would decrease the advertising prices that broadcasters could charge, thereby reducing their revenue and negatively affecting the amount of locally produced programming.[229]

V. POTENTIAL PUBLIC INTEREST BENEFITS

A. Analytical Framework

75. As part of our public interest evaluation, we consider whether the transaction is likely to produce public interest benefits.[230] We apply several criteria in deciding whether a claimed benefit should be considered and weighed against potential harms. First, the claimed benefit must be transaction specific. This means that the claimed benefit must be likely to be accomplished as a result of the transaction but be unlikely to be realized by other means that entail fewer anticompetitive effects. Second, the claimed benefit must be verifiable.[231] Applicants are required to provide sufficient supporting evidence so that the Commission can verify the likelihood and magnitude of each claimed benefit.[232] We will discount or dismiss speculative benefits that cannot be verified.[233] In this regard, benefits that are expected to occur only in the distant future are inherently more speculative than benefits that are expected to occur more immediately. Moreover, we calculate the magnitude of benefits net of the cost of achieving them.[234] Third, the benefits must flow through to consumers, and not inure solely to the benefit of the company.[235]

(Continued from previous page)
Applicants' course of action or whether increasing commercial time during programming would be economically advantageous.

[228] Application at 22, n.51 (citing Phil Rosenthal, *Satellite deal foes don't hear message*, CHICAGO TRIBUNE (Feb. 28, 2007) (summarizing an Arbitron study that found satellite radio accounted for 3.4 percent of radio listening)); see also The Katz Radio Group, *Satellite Radio Penetration*, RADIOWAVES (Dec. 2006) *at* http://www.katz-media.com/pubs/RadioWaves/121206/RadioWavesDEC2006.pdf (finding that satellite radio constituted 4.1 percent of the market) (visited June 19, 2008).

[229] For a related discussion concerning the prohibition on the insertion of local content on terrestrial repeaters, see Section VI.C.2, *infra*.

[230] For instance, we consider "any efficiencies and other benefits that might be gained through increased ownership or control." Communications Act § 613(F)(2)(D), 47 U.S.C. § 533(f)(2)(D).

[231] *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3330-31 ¶ 140; *News Corp.-Hughes Order*, 19 FCC Rcd at 610 ¶ 317; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20630 ¶ 189-90; *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, 12 FCC Rcd 19985, 20064 ("*Bell Atlantic-NYNEX Order*") (1997); *SBC-Ameritech Order*, 12 FCC Rcd at 20064 ¶ 158; *Comcast-AT&T Order*, 17 FCC Rcd at 23313 ¶ 173.

[232] *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3331 ¶ 140; *News Corp.-Hughes Order*, 19 FCC Rcd at 610 ¶ 317; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20630 ¶ 190; *Comcast-AT&T Order*, 17 FCC Rcd at 23313 ¶ 173; *see also 1992 Horizontal Merger Guidelines* § 4 (Rev. 1997).

[233] *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3331 ¶ 140; *News Corp.-Hughes Order*, 19 FCC Rcd at 611 ¶ 317; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20630 ¶ 190.

[234] *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3331 ¶ 140; *News Corp.-Hughes Order*, 19 FCC Rcd at 610-11 ¶ 317; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20630 ¶ 190.

[235] *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3331 ¶ 140; *Applications of Western Wireless Corp. and ALLTEL Corp. for Consent to Transfer Control of Licenses and Authorizations*, 20 FCC Rcd 13053, 13100 ¶ 132 (2005) ("*ALLTEL-WWC Order*").

76. Finally, we apply a "sliding scale approach" to our ultimate evaluation of benefit claims. Under this approach, where potential harms appear both substantial and likely, Applicants' demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than the Commission would otherwise demand.[236] On the other hand, where potential harms appear less likely and less substantial, we will accept a lesser showing.[237]

B. Claimed Benefits

77. Applicants claim that the transaction will increase competition and benefit consumers. They maintain that the synergies and resulting cost savings from the merger will allow the combined entity to offer greater programming choices and lower prices, as well as preserve the future viability of satellite radio.[238] Specifically, the claimed benefits include: (1) more programming choice at lower prices,[239] (2) more diverse programming,[240] (3) accelerated deployment of advanced technology,[241] (4) commercialization of interoperable radio receivers,[242] and (5) operational efficiencies to safeguard the future of satellite radio.[243] Moreover, Applicants claim that the combined company will be able to eliminate redundant programming, which will eventually free capacity for more diverse offerings that are not currently available on either company's system, including expanded non-English language programming, children's programming, and additional programming aimed at minority and other underserved populations.[244] Applicants explain that without the merger, an increase in programming diversity is unlikely, as both companies will be required to maintain overlapping, mainstream content in order to retain and attract customers.[245] We find that these programming options offer consumers enhanced choices and are merger-specific benefits. Based on the evidence before us, however, we do not find the other claimed benefits to be merger specific. We discuss each of Applicants' claimed benefits below.

1. Increased Programming Options/Lower Prices

78. Applicants advance two types of additional programming options and pricing structures for consumers that, they argue, are benefits specific to the proposed merger. First, Applicants pledge to offer consumers new packaged channel options designed to take advantage of the addition of each Applicant's unique programming to the other's service in the short term. Second, to serve the interests of consumers who prefer greater control over their programming options, Applicants propose to offer an a la

[236] *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3331 ¶ 141; *News Corp.-Hughes Order*, 19 FCC Rcd at 611 ¶ 318; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20631 ¶ 192 (citing *SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 256).

[237] *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3331 ¶ 141; *AT&T Inc., and BellSouth Corp., Application for Transfer of Control*, 22 FCC Rcd 5662, 5761-62 ¶ 203 (2007) ("*AT&T-Bell South Order*").

[238] Application at 10.

[239] *Id.* at 10-12.

[240] *Id.* at 12-14.

[241] *Id.* at 14-15.

[242] *Id.* at 15-16.

[243] *Id.* at 17-20.

[244] Applicants assert this increased program diversity on satellite radio may even stimulate more diverse programming on terrestrial radio. *Id.* at 13 n.32.

[245] *Id.* at 13.

carte channel selection system that will give subscribers the power to tailor their channel selections to their own tastes and interests.

a. New Programming Packages

79. Applicants propose to offer a number of new programming packages at lower prices to subscribers.[246] Specifically, Applicants claim that they will offer consumers a range of new programming packages at prices lower than currently available, including: (1) a "Mostly Music" package, which includes commercial-free music as well as several family-oriented and religious channels and emergency alerts, for $9.99 per month; (2) a "News, Sports & Talk" package, which includes various sports, talk and entertainment, family, news, traffic and weather, and emergency channels, for $9.99 per month; (3) two "Family Friendly" packages, which exclude adult-themed content, at a cost of $11.95 per month or $14.99 per month, respectively; and (4) a "best of both" package, which will enable customers to receive selected programming from both companies at a cost of $16.99 per month.[247] Applicants assert that these new programming packages will result in public interest benefits in the form of lower prices and greater consumer choice.[248]

80. Commenters disagree about the potential benefits of Applicants' proposal to offer new programming packages to subscribers. WIPP agrees with Applicants that the merger will create public interest benefits, because operational efficiencies created by the merger will result in lower prices for consumers.[249] Others criticize the proposal, particularly the proposed "best of both" package. C3SR criticizes Applicants' proposed tiered programming packages on the grounds that (1) the proposed packages will cost more than the current service packages offered by Applicants, (2) the premium channels cost more per channel, (3) the base rates are not guaranteed, (4) consumers are unlikely to have the two satellite receivers necessary to receive such programming, and (5) providing crossover programming would increase costs due to exclusive agreements and limiting technology in existing receivers and that costs per channel would increase.[250] NATOA expresses concerns about potential exclusivity clauses in Applicants' programming agreements, arguing that such clauses may place some of the exclusive content that might otherwise be offered in Applicants' "best of both" package out of consumers' reach.[251]

81. Applicants respond that the "best of both" package represents a significant discount – 34 percent – over the only way to obtain all of the programming included in this package today – buying a

[246] *See* Applicants' June 13, 2008 Ex Parte at 1-3. Applicants have voluntarily committed to provide these programming options, "subject to individual channel changes in the ordinary course of business and, in the case of certain programming, the consent of third-party programming providers." *Id.* at 3.

[247] *Id.* at 1-3.

[248] Joint Opposition at 12, 14. RIAA raised concerns about the impact of the transaction on the recording industry. Letter from Victoria F. Sheckler, Deputy Gen. Counsel, RIAA, to Marlene H. Dortch, Secretary, FCC (July 23, 2008). In response, Applicants state that the "a la carte and other programming proposals were not intended, and are not anticipated, to reduce revenue from copyright royalty payments." Instead, they explain that the programming packages "were designed to provide more choice and lower prices and hopefully increase revenue, which should have a positive effect on copyright royalty payments to artists and record companies." Applicants' July 25, 2008 Ex Parte at 2.

[249] WIPP Comments at 1-3.

[250] C3SR Reply at 17-18. C3SR also claims that subscribers will need a new receiver to have the option to choose smaller bundled packages with channels from both services. C3SR Reply at 17. Applicants specifically state that this is not a requirement. Joint Opposition at 12.

[251] NATOA Petition at 4.

Sirius satellite radio, an XM satellite radio, and paying monthly subscription fees totaling $25.90 (two times $12.95) to Sirius and XM.[252] Applicants note that a number of subscribers expressed interest in receiving through a single receiver exclusive content not available on their current service.[253] Applicants also cite to a CRA analysis that found that introducing new programming packages, without taking away current options, necessarily raises consumer welfare.[254] The study concluded that no packages that combine content from the two providers would be available absent the merger.[255]

82. Knowledge Ecology International ("KEI") states that the proposed pricing plans are temporary and are not guaranteed over the longer term.[256] We find that KEI's argument is sufficiently addressed by Applicants' voluntary commitment, which will ensure that these benefits materialize. As discussed below, Applicants have voluntarily committed to offer for sale an interoperable receiver in the retail after-market within nine months of the consummation of the merger,[257] as well as capping the price for all proposed (as well as current) programming packages for at least 36 months after consummation of the merger.[258] This voluntary commitment ensures that these programming packages will be available at the rates proposed by Applicants for at least three years after the merger occurs.

83. We conclude that Applicants' proposed new programming packages will increase consumer choice and offer consumers lower-cost options. These are well-recognized public interest benefits.[259] While some commenters criticize specific aspects of Applicants' proposal, no one disputes that these new packages would offer consumers additional choice, or that a number of the packages are priced lower than Applicants' current offerings. Although the proposed "best of both" package (which combines some of the most favored content from both XM and Sirius) is priced higher than Applicants' current offerings, the content included in this proposed package can be accessed today only by subscribing to both XM and Sirius, obtaining receivers for each Applicant's service, and paying monthly fees totaling $29.50.[260] Finally, with respect to comments addressing the impact of exclusivity provisions in Applicants' programming agreements, we find that only a small fraction of the agreements contain provisions of this type. In addition, Applicants have promised to "conduct a thorough analysis of the existing contracts and negotiate any new terms that may be necessary to implement the proposed programming options."[261] This pledge, in combination with the relatively small number of agreements containing exclusivity provisions, gives us confidence that the vast majority of Applicants' programming will be available post-merger.

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[252] Applicants' Supp. Comments at 9.

[253] *Id.*

[254] Joint Opposition at 16 (citing C3SR Petition, CRA Study at 83).

[255] *Id.*

[256] KEI Reply at 2-3.

[257] Applicants' July 25, 2008 Ex Parte at 2; see discussion in Section VI.B.3, *infra*.

[258] Applicants' June 13, 2008 Ex Parte at 5; see discussion in Section VI.B.1, *infra*.

[259] *Adelphia Order*, 21 FCC Rcd 8307 ¶ 243 (2006) ("[E]fficiencies created by a proposed transaction can mitigate anticompetitive harms if they enhance a firm's ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service, or new products.); *News Corp.-Hughes Order,* 19 FCC Rcd at 610 ¶ 316; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 158; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 129; *see also Horizontal Merger Guidelines* § 4.

[260] Even if we were to consider the "best of both" package as being a price increase, a number of the other proposed packages are priced lower than Applicants' current offerings.

[261] Sirius Nov. 16, 2007 Response to Information and Document Request, Narrative at 61.

84. Moreover, despite some commenters' claims to the contrary, we find these benefits to be merger specific.[262] We note that "the Commission does not have to find that a proposed transaction or merger is the only means to achieve a claimed benefit,"[263] merely that the benefit is unlikely to be achieved by another means that would entail fewer anticompetitive effects. After reviewing the record, we conclude that this is the case with regard to each of the new programming packages. The record indicates that prior to the merger, **[REDACTED]**.[264] Accordingly, we accept Applicants' assertion that the proposed programming packages would not be offered by Applicants absent a merger and find the benefits that will accrue from the offering of such packages in the future to be merger specific.

b. A la Carte Programming

85. In addition to the new packaged programming options proposed by Applicants, Applicants voluntarily commit to offer two a la carte offerings to subscribers.[265] "A La Carte I" would allow a subscriber to individually select 50 channels for $6.99 per month. Subscribers to A La Carte I will be able to purchase additional individual channels for 25 cents per month each as well as "premium" packages of certain Sirius channels for $5 or $6 per month each and of certain XM channels for $3 or $6 per month each. "A La Carte II" would allow a subscriber to select 100 channels, including access to "best of both" programming offered by the other satellite provider, for $14.99 per month. Subscribers would have the ability to craft an individualized line-up that includes some of the most popular and appealing programming currently offered by the other provider. Subscribers would select the channels they wish to receive via Applicants' websites. Applicants assert that the proposed a la carte plans would create public interest benefits in the form of lower prices and greater choice.

86. A number of commenters respond that subscribers will receive fewer channels and will pay the same or slightly more for them.[266] C3SR asserts that Applicants' a la carte plan is in reality a tiered bundling of reduced total programming that costs more on a channel-by-channel basis than Applicants' current packages.[267] C3SR states that Applicants fail to explain how less content for less money is the same or better than the current competition between two providers.[268]

87. Applicants dispute these assertions. According to Applicants, "[a] subscriber choosing the A La Carte I plan would save more than 70 dollars a year."[269] Applicants contend that opponents' assertions regarding the per-channel price of the a la carte options are fundamentally flawed because they

[262] King Comments at ¶¶ 77-78; Smith Comments at 8-11; NAB Response to Comments at 22-25; Letter from David K. Rehr, NAB, to Kevin J. Martin, Chairman, FCC (July 25, 2007) at 3-4; KEI Reply at 2-3.

[263] *Adelphia Order*, 21 FCC Rcd at 8314 ¶ 261.

[264] *See, e.g.*, XMH-008-00002391, XMH-001-00004380, and XME-009-00046821 **[REDACTED]**.

[265] Applicants' June 13, 2008 Ex Parte at 1-3. Applicants have voluntarily committed to provide these programming options, "subject to individual channel changes in the ordinary course of business and, in the case of certain programming, the consent of third-party programming providers." *Id.* at 3.

[266] NATOA asserts that consumers will receive fewer channels under the a la carte option while paying essentially the same $12.95 price as that charged for the regular XM or Sirius package. NATOA Petition at 4. Similarly, Common Cause argues that the opt-out system proposed by XM and Sirius may not save consumers money, depending on how channels are valued. Common Cause Petition at 44. *See also* NPR Petition at 18-19; NAB Reply to Opposition at 8-9.

[267] CS3R Reply at 17; *see also* NAB Petition at 20-21 (arguing that a la carte would require the manufacture and sale of next generation receivers).

[268] CS3R Reply at 17.

[269] Applicants' Supp. Comments at 8.

assume that all subscribers value all channels equally, which, Applicants assert, is not the case.[270] Rather, Applicants claim that a subscriber who only listens to 20 channels on Sirius' service would pay more than 64 cents per month per valued channel under the current Sirius plan, but would pay approximately 35 cents per month for those channels under the A La Carte I plan. Applicants add that consumers who value having more channels will not be harmed because such individuals will continue to be able to purchase the full set of channels offered by Sirius or XM at the current price or choose a new option that includes additional programming.[271]

88. We conclude that Applicants' voluntary a la carte commitment represents a clear public interest benefit. First, consumers will benefit from their ability to tailor the programming they receive to match their individual tastes and interests. The proposed a la carte system will allow consumers to, in effect, "block" unwanted or objectionable content that would otherwise be delivered to consumers' SDARS devices. Second, the proposed a la carte system will ensure that customers of the merged company have greater control over the programming they receive and pay for than subscribers to XM or Sirius currently enjoy. Third, consumers will benefit from their ability to obtain more programming that they desire for lower prices. In order to ensure that consumers have ready access to relevant information concerning their programming options, we also require that the combined company make the content and price details concerning its a la carte options and channel lineups clearly available on its websites.

89. Our conclusion that the voluntary a la carte commitment proposed by Applicants is by nature a public interest benefit is consistent with the conclusion in the *Further Report on the Packaging and Sale of Video Programming Services to the Public* that "[a] la carte could be preferable to bundling in providing diverse programming response to consumer demand."[272] In that Report, the Media Bureau also noted that consumer choice over content is an important consumer benefit, stating that "[t]he marketplace will thus be able more quickly to shed unpopular networks in favor of popular networks under a la carte than under bundling and in the process become more responsive to consumer demand for better programming. Programmers may also have an increased incentive to improve their programming under a la carte."[273]

90. We find unpersuasive the argument that Applicants' proposal falls short of a "true" a la carte option.[274] The Commission's goal is to ensure that the public receives the greatest benefit from services that require use of public spectrum. Applicants' promised a la carte options plainly will enhance consumer choice and will provide subscribers with an opportunity to lower their bills.

91. We find other criticisms of the proposal likewise unpersuasive. For example, NAB, NPR, and the Consumer Federation of America, Consumers Union, and Free Press ("CFA") assert that Applicants' claims of benefits arising from their proposed new programming packages are speculative and non-verifiable.[275] As stated above, both NAB and C3SR question when Applicants will make available the interoperable receiver necessary to initiate the proposed a la carte offering.[276] Commenters

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[270] *Id.*

[271] *Id.* at 8-9.

[272] Media Bureau, *Further Report On the Packaging and Sale of Video Programming Services To the Public* (Med. Bur., Feb. 9, 2006) at 5 ("*Further Report on Video Programming*"), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf.

[273] *Further Report on Video Programming* at 35-36.

[274] C3SR Reply at 17.

[275] NAB Petition at 37-38; NPR Petition at 19; Common Cause Petition at 42-43; CFA Supp. Comments at 4; C3SR Reply at 17-21, 23.

[276] NAB Reply to Opposition 8; C3SR Reply at 17-21, 23-24.

also contend that subscribers have no guarantees as to the quality or duration of any benefits from the pricing and programming offerings.[277] As discussed further below, we find that Applicants' voluntary commitments address these criticisms by ensuring that the claimed benefits are likely to materialize in the near term. We note that in addition to the voluntary commitments regarding programming, Applicants also have voluntarily committed to offer for sale an interoperable receiver in the retail after-market within nine months of the consummation of the merger,[278] and cap for at least 36 months the price of all proposed (as well as current) programming packages.[279] These voluntary commitments ensure that consumers will receive Applicants' proposed a la carte offerings and that these offerings will be available for at least three years at the proposed price.

92. Finally, a number of commenters assert that Applicants' promised a la carte offering is not a merger-specific benefit because each company could offer a la carte today.[280] Applicants disagree, asserting that both Sirius and XM have experienced billions of dollars in losses and that neither company has ever turned a profit.[281] They assert that, without the synergies and economies of scale created by this merger, neither company could afford to introduce a la carte offerings.[282] We find that Applicants are not likely to offer a la carte options absent the merger. Thus, the public interest benefits associated with these a la carte offerings are merger specific.

93. As we note in Section IV.B.1., above, under our "worst-case scenario" approach, we assume, *arguendo,* that the merged firm would have an incentive to charge prices that are higher than those charged by Applicants as independent competitors. The voluntary a la carte commitments will provide an additional "safety valve" against price increases in the future. The a la carte system provides individual consumers with increased choice as to the cost of the services they will receive from the merged entity, allowing consumers to tailor their SDARS service not only to fit their programming tastes, but individual budgets as well. Should the merged entity choose to raise prices for its services in the future, consumers electing the a la carte plan will be able to reduce the number of channels selected to compensate for the price increase. This option for consumers places an additional check on the merged entity's ability to raise prices that does not exist under Applicants' current "take-it-or-leave-it" single service offerings. Accordingly, in addition to the general increase in consumer welfare that results from giving subscribers increased control over the type of programming they receive, the increased bargaining power held by consumers post-merger will help alleviate the potential competitive harms resulting from the merger.

2. Accelerated Deployment of Advanced Technology

94. Applicants claim that the merged entity will realize efficiencies that will allow the offering of advanced technologies and new services sooner than would occur absent the transaction. They state that subscribers will have access to a wider range of easy-to-use, multi-functional devices such as real-time traffic and rear-seat video devices, as well as new services such as advanced data and telematics

[277] NAB Petition at 37-39; NPR Petition at 19; Common Cause Petition at 42-43; CFA Supp. Comments at 4; C3SR Reply at 17-21.

[278] Applicants' July 25, 2008 Ex Parte at 2; see discussion in Section VI.B.3, *infra.*

[279] Applicants' June 13, 2008 Ex Parte at 5; see discussion in Section VI.B.1, *infra.*

[280] C3SR Comments at 34-35; NABOB Petition at 6-7; NPR Petition at 18-19; AAI Comments at 10-12; Clear Channel Comments at 6; Common Cause Petition at 44; Entravision July 9, 2007 Comments at 17; King Comments at ¶ 78; Smith Comments at 8-11; King Reply at ¶ 24; NAB Response to Comments at 22-25.

[281] Joint Opposition at 17.

[282] *Id.* As noted in Section V.B.1.a., above, evidence in the record indicates that **[REDACTED]**. *See* section V.B.1.a, *supra.* **[REDACTED]**

services, including traffic, weather, and "infotainment" services.[283] The claimed efficiencies are based on combining Applicants' engineering resources, as well as accelerated involvement of third-party manufacturers and technology partners in developing and offering new devices and services based on common engineering standards and protocols for the combined company.[284]

95. We agree with commenters that these claimed public interest benefits are not cognizable.[285] Some advanced services data and telematics services already are being introduced by Applicants.[286] Moreover, the analysis submitted by Applicants relies **[REDACTED]**. Given that the additional capacity will not be available until after interoperable receivers are widespread, we find that, to the extent that this claimed benefit might be based on the availability of additional capacity (and thus be merger specific), it is speculative.[287]

3. Commercial Availability of Interoperable Satellite Radio Receivers

96. Applicants claim that the proposed transaction will foster the commercial introduction of interoperable satellite radios.[288] Applicants state that, absent the merger, they would have little incentive to subsidize the cost of interoperable receivers, and that, without a subsidy, manufacturers have not expressed interest in producing or distributing interoperable radios.[289]

97. Regardless of whether the proposed merger facilitates the commercial introduction of an interoperable satellite radio, it cannot be considered as a merger-specific benefit because existing Commission rules already require Applicants to introduce such a radio regardless of the merger.[290] Eleven years ago, when the Commission required that SDARS operators certify that their system includes a receiver design that permits all users to access all SDARS systems, it noted that the mandate would encourage consumer investment in equipment, create economies of scale, and "promote competition by reducing transaction costs and enhancing consumers' ability to switch between competing DARS providers."[291] To the extent that increased competition between SDARS providers was viewed as one of the benefits from promoting receiver interoperability, the commercial availability of interoperable satellite receivers, in the context of the proposed transaction, will not provide that benefit.

98. Furthermore, to the extent that timely, widespread penetration of interoperable receivers will be necessary for the realization of any of the other potential public interest benefits, such as increased

[283] Application at 14-15.

[284] *Id.* at 15.

[285] NAB Petition at 42-43 (stating "nothing currently prevents the companies from working together to develop 'common engineering standards and protocols'" (citing Application at 15)); *see also* AAI Comments at 15 (stating that there is "no indication why such benefits 'would not be possible absent the proposed transaction.'" (citing Application at 14-15)).

[286] *See* Application at 14-15; Joint Opposition at 22-23, nn.62-63 (stating that both companies currently offer integrated traffic and navigation systems for automobiles and that Sirius and Chrysler Group announced the launch of SIRIUS Backseat TV™).

[287] *See* Sirius Nov. 16, 2007 Response to Information and Document Request IV.A-B at SIRIUS-FCC-IV.000005 and SIRIUS-FCC-IV.000087.

[288] Application at 15-16.

[289] *Id.* at 16.

[290] *See* 47 C.F.R. § 25.144(a)(3)(ii). For a detailed discussion of Applicants' existing interoperable radio obligations, *see* Section VI.B.3, *infra*.

[291] *1997 SDARS Service Rules Order*, 12 FCC Rcd at 5796 ¶ 105.

program diversity, spectrum efficiencies, or other operational efficiencies, the timely commercial availability of an interoperable receiver does not provide a separate public interest benefit, but is necessary if the other potential public interest benefits are to be considered cognizable. Thus, we cannot consider the commercial availability of interoperable receivers to be a merger-specific benefit. Instead, we review this issue in Section VI.B., below. We note, however, that Applicants' voluntary commitment to offer for sale an interoperable receiver in the retail aftermarket within nine months of consummation of the merger will facilitate the realization of other claimed public interest benefits in a timely manner.[292]

4. Operational Efficiencies

99. Applicants claim that the proposed transaction will allow the merged firm to achieve operational efficiencies that will reduce costs, and that those cost savings can be passed on to subscribers in the form of lower subscription rates. The claimed efficiencies include the ability to reduce programming expenses by eliminating duplicative staffing needed for the creation of self-produced music programming; to reduce operational expenses for the infrastructure used to broadcast and transmit satellite radio programming; to reduce marketing and subscriber acquisition costs, including efficiencies due to economies of scale in equipment; to reduce duplicative research and development efforts and accelerate innovation in products and services in the retail and automotive distribution channels; and to achieve operating efficiencies by reducing duplicative general and administrative expenses.[293] Applicants also maintain that, with their proposed merger, they will be able to operate more effectively by adopting the best and most efficient practices of the two companies based on their core competencies.[294]

100. We find that some of the claimed efficiencies, such as some of the reduced operational expenses and claimed scale economies for some equipment design, are not merger specific.[295] However, others of the claimed savings relate to the elimination of duplicate expenses and scale economies which can only be achieved by the combined company.[296] To the extent that any of the claimed efficiencies might be obtainable by other means that would entail fewer anticompetitive effects, the Commission would discount that portion of the claimed benefits.[297]

101. In addition, Applicants have not provided sufficient evidentiary support to estimate the magnitude of many of the claimed efficiencies.[298] Of those efficiencies that might be considered to be

[292] *See* Section VI.B.3, *infra.*

[293] Application at 17-20. See also Sirius Nov. 16, 2007 Response to Information and Document Request IV at SIRIUS-FCC-IV.000012-000076, for a more detailed description of the claimed savings.

[294] Application at 18-19.

[295] NAB Petition at 45-46 (claiming that the reduction in operational expenses relating to maintaining "distinct broadcast operations infrastructure to facilitate the scheduling, storage, compression, transmission, and uplink of programming and content to Applicants' satellites and terrestrial repeater networks" may not be merger specific because it is not clear whether these savings could not be obtained through other means. (citing Application at 17)). *See* Sirius Nov. 16, 2007 Response to Information and Document Request IV.A-B at SIRIUS-FCC-IV.000048-000049 **[REDACTED]**.

[296] Application at 17-18. *See also, e.g.,* Sirius Nov. 16, 2007 Response to Information and Document Request IV at SIRIUS-FCC-IV.000026-000048. **[REDACTED]**.

[297] Most of the claimed efficiencies that might have been obtainable by other means would also be discounted in our analysis inasmuch as they would not be realized within several years of closing or the claimed savings would relate to a reduction in fixed costs, rather than variable costs.

[298] Mar. 24, 2008 DOJ Press Release at 4 ("It was not possible to estimate the magnitude of the efficiencies with precision due to the lack of evidentiary support provided by XM and Sirius, and many of the efficiencies claimed by the parties . . . were not likely to be realized within the next several years.").

merger specific, some are not expected to be realized within several years of closing.[299] For example, Applicants claim that there will be merger-specific savings in satellite operations, broadcast operations, terrestrial networks, programming and content, customer service and billing, sales and marketing, subscriber acquisition costs, general and administrative costs, product development, and interest expense.[300] Some efficiencies, such as savings from elimination of duplication in non-unique, self-produced music channels, can be realized relatively quickly,[301] but other efficiencies, such as the more efficient use of spectrum through the elimination of the need to broadcast largely duplicative content, can only be realized once interoperable receivers are widespread.[302] Some of the efficiencies related to the satellite fleet and satellite operations would be implemented over a long period of time.[303] These savings are discounted in our analysis to the extent that some of the savings cannot be verified and some of the efficiencies would only be expected to be realized in the distant future.[304]

102. With respect to programming costs, NAB notes that the merged firm would not be able to eliminate some of the most expensive programming due to existing long-term contracts.[305] However, Applicants' claimed savings with respect to programming costs are based largely on eliminating duplication in the overhead and production of similarly formatted channels and improving scale economies in content acquisition.[306] Potential cost savings on content covered by long-term contracts would only be realized as the contracts covering the content come up for renewal.[307]

103. We agree with commenters who express concern that consumers will not benefit from some of the claimed efficiencies, inasmuch as some of the savings relate to a reduction in fixed costs, not

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299 *See* Sirius Nov. 16, 2007 Response to Information and Document Request IV.A-B at SIRIUS-FCC-IV.000006-000007.

300 Joint Opposition at 26-29. See Sirius Nov. 16, 2007 Response to Information and Document Request IVA-B at SIRIUS-FCC-IV.000012-000076 for a description of the claimed savings.

301 *See also* Sirius Nov. 16, 2007 Response to Information and Document Request IVA-B at SIRIUS-FCC-IV.000018-000019.

302 See Sirius Nov. 16, 2007 Response to Information and Document Request IVA-B at SIRIUS-FCC-IV.000086-000087 **[REDACTED]**. *See also* XM Nov. 16, 2007 Response to Information and Document Request IVA-B, Narrative at 25-26 (noting that XM anticipates that **[REDACTED]** million XM single-platform devices will be factory installed in vehicles sold for the period **[REDACTED]**, and are likely to remain in widespread use for **[REDACTED]**. XM also states that the combined company "will need to broadcast a full complement of programming to both the XM and Sirius platforms for many years, including the useful life of the XM satellite constellation." *Id.* at 25).

303 *See* Sirius Nov. 16, 2007 Response to Information and Document Request IV.A-B at SIRIUS-FCC-IV.000049-000054, **[REDACTED]**.

304 *See* Sirius Nov. 16, 2007 Response to Information and Document Request IV.A-B at SIRIUS-FCC-IV.0000005-000008, SIRIUS-FCC-IV.000012-000076 for a summary of efficiencies and estimated timing. For example, **[REDACTED]**.

305 NAB Petition at 45.

306 Joint Opposition at 27. *See also* Sirius Nov. 16, 2007 Response to Information and Document Request IV.A-B at SIRIUS-FCC-IV.000016-000026, for an analysis of savings that can be realized from the elimination of duplicative programming-related expenses and through economies of scale in content acquisition.

307 *See* Sirius Nov. 16, 2007 Response to Information and Document Request IV.A-B at SIRIUS-FCC-IV.000023-000026, and SIRIUS-FCC-I.B.001647-001657, XM-I-B-3-00000734, and XM-I-B-3-00003738-00003743. **[REDACTED]**.

variable costs.[308] Applicants engaged an outside consulting firm to evaluate the claimed efficiencies arising from the merger, and the firm concluded that such efficiencies will likely lead to reductions in both marginal and fixed costs, with [REDACTED] percent of the claimed annual savings attributed to a reduction in variable costs.[309] We find that, to the extent that [REDACTED] percent of these efficiencies lead to a reduction in variable costs, consumers will benefit from those claimed savings. However, only [REDACTED] percent of the efficiencies that lead to a reduction in variable costs would likely be realized within the next several years.[310] Thus, the remainder of those efficiencies are speculative. As a result we find that only [REDACTED] percent of the claimed efficiencies are likely to be realized within several years of the transaction and could lead to a reduction in variable costs. Accordingly, we find that consumers might benefit from, a small percentage, at most, [REDACTED] percent, of the claimed efficiencies.

VI. BALANCING PUBLIC INTEREST HARMS AND BENEFITS

A. General Introduction and Summary

104. As previously noted, under the Communications Act, we must determine whether the "public interest, convenience and necessity will be served" by the granting of the Application.[311] We now employ a balancing process, weighing the potential public interest harms of the proposed transaction that we have found against the potential public interest benefits.[312] Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.[313] Absent Applicants' voluntary commitments and other conditions, the harms outweigh the potential benefits; the presence of these voluntary commitments mitigates the harms and ensures that benefits are realized. The Application and the record before us make clear that, on balance, the public interest will be served by approval of the Application subject to the voluntary commitments and other conditions that we discuss below. Accordingly, we accept the Applicant's voluntary offer of these commitments with the expectation that Applicants will adhere to each according to its specified terms and within the specified timeframes.[314] These voluntary commitments are fully enforceable by the

[308] NAB Petition at 45, 46, 47.

[309] *See* Sirius Nov. 16, 2007 Response to Information and Document Request IV.A-B at SIRIUS-FCC-IV.000016. [REDACTED].

[310] *See* Sirius Nov. 16, 2007 Response to Information and Document Request IV.A-B at SIRIUS-FCC-IV.000007, SIRIUS-FCC-IV.000016, and SIRIUS-FCC-IV.000060-.000061.

[311] *See* 47 U.S.C. §§ 309(a), (d); 310(d).

[312] *See SBC-AT&T Order,* 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order,* 20 FCC Rcd at 18443 ¶ 16; *Sprint-Nextel Order,* 20 FCC Rcd at 13976 ¶ 20; *News Corp.-Hughes Order*, 19 FCC Rcd at 483 ¶ 15; *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 26; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20574 ¶ 25. See Section VII.A., *infra*, for discussion of the applicable language in the Commission's *1997 SDARS Service Rules Order*, prohibiting the transfer of control of one SDARS licensee to the other SDARS licensee. As discussed below, the Commission finds that the prohibition set forth in paragraph 170 of the *1997 SDARS Service Rules Order* is a binding substantive rule, and that it is in the public interest to repeal the rule prohibiting the merger.

[313] *See SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976-77 ¶ 20; *News Corp.-Hughes Order*, 19 FCC Rcd at 483 ¶ 15; *Comcast-AT&T Order*, 17 FCC Rcd at 23225 ¶ 26; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20574 ¶ 25.

[314] Clear Channel suggests that Applicants' voluntary commitments are not enforceable. Letter from Lawrence R. Sidman, Paul Hastings, Counsel for Clear Channel, to Marlene H. Dortch, Secretary, FCC (June 20, 2008) at 2. We disagree. As we state herein, grant of the Application is conditioned on the merged entity's fulfillment of Applicants' voluntary commitments and other conditions. Therefore, the merged entity's compliance with the voluntary commitments is an enforceable condition.

Commission.

B. Applicants' Voluntary Commitments and Other Conditions

1. Price Cap

105. For the reasons given above, we assume that the relevant product market may be limited to SDARS, and therefore that it is likely that the merged entity will have an increased incentive and ability to raise prices above pre-merger levels and that this incentive and ability will grow stronger over time.[315]

106. As discussed above, Applicants have argued, however, that due to the particular nature of demand for satellite radio services, the merged entity will have an incentive instead to lower prices.[316] Several commenters dispute this argument, and instead predict that the merged entity will raise prices. For example, NAB states that SDARS is the relevant market, that the merger will lead to a monopoly, and that demand is relatively inelastic, so that the merged entity will be able to raise prices profitably.[317] C3SR agrees with a narrow product definition, and raises concerns regarding higher prices, foregone benefits from price competition, increased advertising, and lower value overall.[318] Similar concerns are raised by Common Cause,[319] KEI,[320] and AAI.[321]

107. To address concerns about such potential price increases, Applicants have voluntarily committed to cap the retail prices on their basic subscription package and on the new programming packages that they voluntarily commit to offer.[322] Specifically, Applicants voluntarily commit to not raise the retail prices on their basic $12.95 per month subscription package, their a la carte programming package, their "best of both" programming packages, their "mostly music" and their "news, sports, and talk" programming packages, and their discounted family-friendly programming package.[323] Applicants voluntarily commit to these price caps for at least 36 months after consummation of the merger.[324] Notwithstanding the voluntary commitment, after the first anniversary of the consummation of the merger, the combined company may pass through cost increases incurred since the filing of the merger application as a result of statutorily or contractually required payments to the music, recording and publishing industries for the performance of musical works and sound recordings or for device recording fees.[325] The combined company will provide customers, either on individual bills or on the combined company's website, details about the specific costs passed through to consumers pursuant to the

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315 Applicants dispute a narrow product market definition, arguing instead that satellite radio faces many competitive alternatives. Application at 20-48. We do not have sufficient evidence in the record to conclude definitively that this is the case. *See* Section IV.B.1.a, *supra*.

316 *See* Application at 10-12. See Section IV.B, *supra*, for further discussion.

317 NAB Petition at 26-29; *see also* NAB Response to Comments at 17-20.

318 *See, e.g.*, C3SR Petition at 13-20.

319 Common Cause Petition at 14-39.

320 *See generally* KEI Reply.

321 AAI Comments at 16-29.

322 Applicants' June 13, 2008 Ex Parte at 5.

323 *See* Sections V.B.1.a-b, *supra.*

324 Applicants' June 13, 2008 Ex Parte at 5.

325 *Id.* *See* Tenn. Att'y Gen. July 3, 2008 Ex Parte at 3.

preceding sentence.[326]

108. We accept this voluntary commitment and conclude that it will mitigate the harm from any post-merger price increases. In addition, Applicants may not reduce the number of channels in either their current packages or their new packages for three years. Some commenters submit that the price cap should be longer than three years, arguing that the potential harms will still remain at the end of the period.[327] We do not know what the competitive landscape will be like in three years. Accordingly, six months prior to the expiration of the commitment period, the Commission will seek public comment on whether the cap continues to be necessary in the public interest. The Commission will then determine whether it should be modified, removed, or extended.[328] We also note that Applicants voluntarily commit to a price cap, not a price freeze, and therefore retain sufficient flexibility to flow through to consumers any cost savings or other efficiencies resulting from the merger.[329]

109. Some commenters argue that a price cap cannot ameliorate the harms that are likely to flow from the merger. CEI, for example, states that price increases are sometimes beneficial for consumers if the resultant overall package is a better deal for consumers, and that fear can prevent companies from instituting price decreases if there is concern that subsequent necessary future increases will cause antitrust action.[330] CEI further argues that intermodal competition (i.e., between SDARS and other technologies) can suffice to discipline the merged company.[331] Common Cause contends that only intramodal competition (i.e., between the existing two SDARS providers) can constrain prices, and thus also concludes that merger conditions cannot ameliorate the harms from the merger. Common Cause therefore opposes merger approval.[332] AAI, referring to the *EchoStar-DIRECTV HDO*, indicates that a price freeze condition would not account for other dimensions of competition, such as quality and

326 *Id.*; *see* Letter from U.S. Sens. John F. Kerry, Benjamin Cardin, and Claire McCaskill, to Kevin J. Martin, Chairman, FCC (June 27, 2008) at 2 (recommending that the Commission impose requirements to make pricing transparent and verifiable) ("Sens. Kerry, Cardin, and McCaskill June 27, 2008 Ex Parte"); Tenn. Att'y Gen. July 3, 2008 Ex Parte at 3 (stating that the Commission should not endorse Applicants' proposed methods of disclosing rate increases because it could be viewed as a preemption of states' existing consumer protection laws).

327 *See, e.g.*, Letter from Gigi B. Sohn, Pres., Public Knowledge, to Marlene H. Dortch, Secretary, FCC (June 18, 2008) ("Public Knowledge June 18, 2008 Ex Parte"); Letter from U.S. Rep. Edward J. Markey, Chairman, House Subcommittee on Telecommunications and the Internet, to Kevin J. Martin, Chairman, FCC (July 15, 2008) at 2 (recommending that the Commission adopt a six-year price freeze) ("Rep. Markey July 15, 2008 Ex Parte").

328 *Cf. Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17795-96 ¶ 5 (2007); *see also Adelphia Order*, 21 FCC Rcd at 8276 ¶ 164; *News Corp.-Hughes Order*, 19 FCC Rcd at 555, 576 ¶¶ 179, 227. Although it is not part of Applicants' voluntary commitment, we are conditioning our approval of the merger on the Commission's ability to modify or extend the price cap beyond three years. We also are conditioning our approval of the transaction on the merged entity's continuing adherence to the other commitments and conditions, as specified herein, which continue indefinitely.

329 Comments received as part of the rulemaking regarding HD Radio technology will help inform our decision regarding the level of competition in the radio market and the continuing need for a price cap. *See* Section VI.B.4, *infra*.

330 CEI Comments at 13.

331 *Id.* at 6-8, 15.

332 Common Cause Petition at 46-48.

innovation, and that it would not allow possible price reductions resulting from SDARS competition.[333] NAB argues that the merged companies cannot be counted on to comply with any conditions, that pricing conditions are of dubious legality, and that approving the merger would contravene the Commission's preference for intramodal competition.[334]

110. We reject these arguments. As stated elsewhere in this document, on balance we find that with the voluntary commitments by Applicants and the other conditions we impose, the benefits of the merger outweigh the potential harms. Because SDARS is in a mode of growing penetration so as to reach profitability, the merged entity will have sufficient incentive to improve quality and innovate for the foreseeable future. Despite this incentive, **[REDACTED]**.[335] Because we do not have sufficient record evidence to conclude that the relevant market includes any other entities than Applicants themselves, we cannot rely upon intermodal competition post-merger to discipline prices. However, Applicants' voluntary commitment will prevent any harm that might result from a possible price increase, if it were intramodal competition that prevented the price increase before the merger.[336] As far as non-compliance is concerned, if NAB or any party has evidence of such behavior, it may file a complaint with the Enforcement Bureau.

2. New Programming Packages and A La Carte Options

111. As discussed in Section VI.B.2., several commenters express concerns about whether the potential competitive harms of the merger can be mitigated by a condition requiring Applicants to offer new programming and a la carte packages.[337] NAB and others state that the effectiveness of such a condition would depend on the array of channels to be included in the package, the attractiveness of the structure to customers, the pricing of the packages, the duration of the offering, the likelihood of changes after the expiration of any short-term conditions, whether equipment prices will increase to offset lost revenue, and whether there will be more advertising-supported programming to offset lost revenues.[338] NAB also raises concerns about the types of programs that will be available in each type of package; whether customers will have to "buy through" a larger basic package before getting combined premium programs at a higher price; what channels will be dropped (reducing consumer choice); and, if no channels are dropped, what kind of audio degradation consumers will face.[339] CFA asserts that the merged entity will likely cite "exclusive programming agreements" as a reason for not including their best programming in particular packages.[340] C3SR questions whether customers will be able to migrate

[333] AAI Comments at 29-30.

[334] NAB Response to Comments at 25-28.

[335] *See, e.g.,* Sirius Mar. 4, 2008 Response to Information and Document Request at SIRIUS-FCC-SUPP.000214-000216, SIRIUS-FCC-SUPP.000311, and SIRIUS-FCC-SUPP.000393; XM Mar. 3, 2008 Response to Information and Document Request at XM-S-0000140-0000158 and XM-S-0000869.

[336] We reject NPR's proposed condition to place the merged entity under Title II common carrier regulation. NPR Petition at 21-22. Applicants' voluntary commitments that we accept in this Order ameliorate the potential harms of this merger adequately, at a much lower cost and with less intrusiveness into the market.

[337] NAB Petition at 37-38; NPR Comments at 19; Common Cause Petition at 42-43; CFA Supp. Comments at 4; C3SR Reply at 17-21, 23.

[338] NAB Petition at 37-38.

[339] *Id.* at 40.

[340] CFA Supp. Comments at 4-5.

between packages and channel selections.[341]

112. In order to address these concerns, Applicants have voluntarily committed to cap current prices and offer a la carte and new programming packages. The merged firm will maintain the current or proposed prices for each their existing and proposed product offerings (including regular, as well as premium channels), for a term of at least thirty-six (36) months after consummation of the merger. In addition, six months prior to the expiration of the commitment period, the Commission will seek public comment on whether the cap continues to be necessary in the public interest. The Commission will then determine whether it should be modified, removed, or extended. This cap on prices will protect consumers while they enjoy the immediate benefits of a la carte pricing options.[342] Applicants have voluntarily committed to introduce the first a la carte-capable receivers in the retail after-market and to begin offering a la carte programming within three months of the consummation of the merger.[343] We find that Applicants' voluntary commitments will mitigate the potential harms identified by NAB and others and will provide a merger-specific benefit to consumers.

3. Interoperable Radio Receivers

113. Section 25.144 of the Commission's rules sets forth the licensing provisions for SDARS systems.[344] As part of these provisions, each applicant for an SDARS license must certify that its system "includes a receiver that will permit end users to access all licensed satellite DARS systems that are operational or under construction."[345] As the Commission stated when it adopted this rule, such receiver interoperability would "at the very least" permit consumers "to access the services from all licensed satellite DARS systems."[346] The Commission stated that a receiver interoperability requirement was an alternative to mandating a specific receiver standard, concluding that a more flexible certification approach would promote innovative system design.[347] In October 1997, the International Bureau granted each Applicant's application to provide SDARS, "subject to certification ... that its final user receiver design is interoperable with respect to [the other SDARS provider's] system final design."[348]

114. Since authorization in 1997, Applicants have twice filed letters with the Commission regarding their compliance with the Commission's receiver interoperability rule. By letter dated October 6, 2000, Applicants stated their "continued compliance" with the receiver interoperability rule and described their efforts towards making available interoperable receivers to the public.[349] Applicants noted

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[341] C3SR Reply at 23.

[342] *See* Section VI.B.1.

[343] Applicants' June 13, 2008 Ex Parte at 2.

[344] 47 C.F.R. § 25.144.

[345] 47 C.F.R. § 25.144(a)(3)(ii).

[346] *1997 SDARS Service Rules Order*, 12 FCC Rcd at 5797 ¶ 106.

[347] *Id.* at 5795 ¶ 102. The Commission also stated that receiver interoperability would encourage consumer investment in SDARS equipment, would create economies of scale necessary to make SDARS receiving equipment affordable, and would promote competition by reducing transaction costs and enhancing consumers' ability to switch between competing SDARS providers. *See id.* at 5796 ¶ 103.

[348] *See 1997 XM Radio Authorization Order,* 13 FCC Rcd at 8851 ¶ 54; *1997 Sirius Authorization Order*, 13 FCC Rcd at 7995 ¶ 57.

[349] Letter from John R. Wormington, Sr. Vice Pres., Eng. and Operations, XM and Robert D. Briskman, Exec. Vice Pres., Eng., Sirius, to Magalie Roman Salas, Secretary, FCC at 2, transmitted by Letter from Jennifer D. Hindin, Wiley Rein & Fielding, Counsel for Sirius, to Magalie Roman Salas, Secretary, FCC, IBFS File No. SAT-LOA-19900518-0003 (Oct. 6, 2000) ("XM/Sirius Oct. 6, 2000 Letter"). These efforts included plans to develop (continued....)

that they "do not control the actual manufacture, distribution and sale of receivers," but instead license their receiver technology to radio manufacturers.[350] As a result, they stated that they rely on such manufactures to produce SDARS receivers, as well as on automakers to install receivers and on retailers to market receivers for installation in existing vehicles.[351]

115. By letter dated March 14, 2005,[352] Applicants reiterated that they had complied with the Commission's interoperability rule "by including interoperable radios in their respective system designs."[353] They claimed that they had designed and licensed receiver systems with common components capable of receiving Sirius or XM programming, although not both simultaneously, and that they had invested nearly $5,000,000 in a joint venture aimed at "combining XM's and Sirius's proprietary chipsets into a compact and efficient device capable of receiving both services."[354] They emphasized, however, that "the availability of interoperable radios ... will depend in large part on factors outside of the control of either XM or Sirius, including consumer demand for interoperability and the willingness of manufacturers to manufacture, distribute, market and sell interoperable radios after carefully weighing the integration, qualification, costs and efficiency considerations."[355]

116. We note that each of Applicants subsidizes the manufacture and sale of receivers in various ways. Applicants state, however, that there is little incentive for each to subsidize the cost of interoperable receivers – as is done with single-system receivers – because of uncertainty whether the subsidy would be recouped since the purchaser might not subscribe to that particular Applicant's service.[356] Applicants state that the absence of subsidization has limited the interest of manufacturers in producing and distributing such interoperable receivers.[357] As a result, no interoperable radio is currently on the market.

117. Commenters in this proceeding disagree whether Applicants' efforts to date comply with the Commission's provisions regarding radio receiver interoperability. Applicants argue that the interoperability requirement mandates that an interoperable receiver be designed, but does not require the production, distribution, marketing, or sale of such a receiver, which Applicants claim is outside of their

(Continued from previous page)
interoperable chipsets capable of receiving both services and an agreement to introduce interim radios that would include a common wiring harness, head unit, antenna, and an interchangeable trunk-mounted box containing processing elements for both company's signals. *Id.* at 4.

[350] XM/Sirius Oct. 6, 2000 Letter at 3.

[351] *Id.*

[352] Letter from William Bailey, Sr. Vice Pres., Reg. and Gov't Affairs, XM and Patrick L. Donnelly, Exec. Vice Pres. and Gen. Counsel, Sirius, to Thomas S. Tycz, Chief, Sat. Div., Int'l Bur., FCC (Mar. 14, 2005) at 1 ("XM/Sirius Mar. 14, 2005 Letter"). This letter responded to a request from the International Bureau to the Applicants to provide "the current status of their efforts to develop an interoperable receiver" and "a clear timeframe for making such an interoperable receiver available to the public." *See XM 2005 Authorization Order*, 20 FCC Rcd at 1625 ¶ 12.

[353] XM/Sirius Mar. 14, 2005 Letter at 1.

[354] *Id.* at 1-2. Applicants stated that they expected that a prototype for this type of interoperable radio would be completed in 2005. *Id.* at 2.

[355] *Id.* at 2-3.

[356] Application at 16.

[357] *Id.* In addition, Applicants state that automobile manufacturers have not opted to include interoperable receivers in their vehicles. *Id.*

control.[358] Relying on their October 6, 2000 and March 14, 2005 letters, Applicants maintain that they have complied with the receiver interoperability requirement by designing an interoperable receiver.[359] Other commenters contend that Applicants have not satisfied the receiver interoperability requirement contained in the Commission's rules.[360] For example, NAB asserts that the receiver interoperability provision requires both the development and the public availability of an interoperable receiver and that, in any event, the design process for an interoperable receiver is not complete.[361] Another commenter claims that existing receivers made available to the public are already capable of interoperability, despite claims by Applicants to the contrary.[362]

118. In addition, C3SR filed a letter on May 27, 2008, alleging that Applicants have not been truthful or candid in their representations regarding compliance with the Commission's receiver interoperability requirement.[363] C3SR states that documents submitted by Applicants demonstrate that instead of complying with the interoperability requirement, Applicants **[REDACTED]**.[364] In particular, C3SR claims that the documents show that Applicants concealed the **[REDACTED]**.[365] C3SR states that the documents also demonstrate **[REDACTED]**.[366] C3SR urges the Commission to designate the merger applications for hearing and to commence an investigation into whether Applicants lacked candor in their representations to the Commission in the Merger Applications and whether the merger is contrary to the public interest because it furthers a conspiracy to restrain trade.[367] In the alternative, if the Commission does not designate the applications for hearing or investigate further, C3SR requests that the Commission impose certain remedies in response to the alleged misconduct, including disgorging profits resulting

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[358] *See* Joint Opposition at 95-96.

[359] Application at 15-16 (citing to the XM/Sirius Mar. 14, 2005 and Oct. 6, 2000 Letters).

[360] Blue Sky Reply at 2-3; Common Cause Petition at 45-46; NABOB Petition at 13-14; King Comments at ¶¶ 8, 82-84; Letter from U.S. Rep. Mike Doyle, to Kevin J. Martin, Chairman, FCC (May 30, 2007) at 1.

[361] NAB Petition at 54 (quoting XM's SEC Form 10-K for the year ended Dec. 31, 2006 (stating "[w]e have signed an agreement with SIRIUS Radio to develop a common receiver platform combining the companies' proprietary chipsets, but the companies have not completed the final design of an operational radio using this platform."); *see also* Letter from Jane E. Mago, Sr. Vice Pres., and Gen. Counsel, Legal and Reg. Affairs, NAB, to Marlene H. Dortch, Secretary, FCC (June 27, 2008); Memorandum from David H. Solomon, Wilkinson Barker Knauer, LLP, to David K. Rehr, Pres., NAB at 7-9, transmitted by Letter from Larry Walke, Assoc. Gen. Counsel, Legal & Reg. Affairs, NAB, to Marlene H. Dortch, Secretary, FCC (Apr. 6, 2007) ("NAB Apr. 6, 2007 Ex Parte, Solomon Memo"); The Proposed Sirius-XM Merger White Paper, the Carmel Group, to NAB, Att. at 7, transmitted by Letter from Larry Walke, to Marlene H. Dortch, Secretary, FCC (July 3, 2007) ("NAB July 3, 2007 Ex Parte, Carmel White Paper").

[362] Michael Hartleib argues that many of the XM and Sirius radios in service today are capable of receiving "either/or" service and signals via a firmware update to the receivers. Letter from Michael Hartleib, to FCC at 4; *see also* Hartlieb Apr. 22, 2007 Petition at 4.

[363] Letter from Julian L. Shepard, Williams Mullen, Counsel for C3SR, to Marlene H. Dortch, Secretary, FCC at 3-8, transmitted by Letter from Julian L. Shepard, Williams Mullen, Counsel for C3SR, to Jamila Bess Johnson, Med. Bur., FCC (May 27, 2008) ("C3SR May 27, 2008 Ex Parte").

[364] C3SR May 27, 2008 Ex Parte at 1.

[365] *Id.* at 5-6. C3SR states that the documents also show that Applicants **[REDACTED]**. *See id.* at 7.

[366] *Id.* at 7.

[367] Letter from Julian L. Shepard, Williams Mullen, Counsel for C3SR, to Marlene H. Dortch, Secretary, FCC (June 4, 2008) at 2.